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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly, in accordance with Commission on Human Rights resolution 2005/2, the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Summary

The Working Group begins by presenting an overview of its activities during the period under review. It also provides an update on recent activities of mercenaries and private military and security companies. As the latest incidents in Côte d'Ivoire and the situation in Libya show, mercenarism remains a serious problem that requires attention. The Working Group notes that activities of private military and security companies have continued to evolve and that these contractors are involved in an ever-expanding range of activities. The Working Group remains concerned about the lack of transparency and accountability of these companies and about the absence of an international regulatory framework to monitor their activities. Lastly, the Working Group reviews developments in attempts to regulate private military and security companies, including at the international and national levels, and industry-led initiatives to raise standards. While the Working Group is encouraged to see recognition of the need for greater regulation, it is of the view that more needs to done. It looks forward to working with States to deepen understanding of the impact on human rights of private military and security companies and the most effective means of ameliorating that impact and ensuring accountability for violations.

Contents

		Page
I.	Introduction	4
II.	Activities of the Working Group during the past year	5
	A. Country visits	6
	B. Communications	6
	C. Other activities of the Working Group	6
III.	Update on mercenary activities	8
IV.	Private military and security companies	11
	A. Evolving role of private military and security companies in Afghanistan and Iraq	11
	B. Maritime security	12
	C. Peace industry	12
V.	Efforts to regulate private military and security companies	13
	A. International regulation	13
	B. Regional efforts	15
	C. Developments at the national level	15
	D. Industry-led initiatives	18
VI.	Conclusions and recommendations	19
	A. Mercenaries	19
	B. Private military and security companies	20

I. Introduction

1. Pursuant to its mandate, the Working Group on the use of mercenaries as a means of violating human rights and the exercise of the right of peoples to self-determination has continued to monitor mercenaries and mercenary-related activities in all their forms and manifestations, and to study the effects on the enjoyment of human rights of the activities of private companies offering military assistance, consultancy and security services on the international market. In accordance with Human Rights Council resolution 18/4 and General Assembly resolution 66/147, the Working Group submits the present report to the Assembly. It covers the period following the submission of the previous report (A/66/317) in August 2011.

2. The events of the past year demonstrate that the involvement of mercenaries in areas of instability and armed conflict remains of concern. In the western part of Côte d'Ivoire, along the border with Liberia, mercenaries were reported to have been involved in several attacks against civilians. In Libya, the extent of the former regime's use of mercenaries remains unclear and several thousand foreigners have reportedly been detained as mercenaries.

3. The activities of private military and security companies have increasingly diversified. With the drawdown of foreign military troops in Afghanistan and Iraq, private military and security company support for these activities is likewise diminishing. Nevertheless, private military and security companies are involved in other activities in these countries, including providing protection to embassies and other diplomatic missions, humanitarian organizations and the United Nations. Private military and security companies have also found another market for their services in the maritime industry, with armed guards increasingly being used on-board ships, in particular off the coast of Somalia. Lastly, private military and security companies are increasingly becoming part of what is known as the "peace industry", as illustrated by their activities in Africa and their use in support of United Nations missions.

4. The lack of accountability for human rights violations committed by private military and security companies in Afghanistan and Iraq was the initial impetus for international, regional, national and industry-led initiatives to regulate the industry. While these efforts stem from the use of private military and security companies in wartime, the ever-expanding reach of an industry that has the potential to have a serious negative impact on human rights means that regulatory efforts must also come to grips with their use outside armed conflict.

5. From 13 to 17 August 2012, representatives of 65 States met at the second session of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. They considered principles, main elements and draft text proposed by the Working Group. The open-ended intergovernmental working group noted that discussions had identified existing gaps and/or areas of concern in relation to the promotion and protection of human rights regarding the activities of the private military and security company industry, which had led to a consensus that there was a need for further discussion. It recommended the continuation of discussions for a further two years on particular aspects of the impact on human rights of private military and

security companies and on the possibility of an international regulatory framework, including the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of such companies, in addition to other approaches and strategies, including international standards.

6. At the national level, the Working Group has noted the development of legislation and regulations, in particular with regard to maritime security companies. At the industry level, the process for developing mechanisms for implementing the International Code of Conduct for Private Security Service Providers is under way. The Working Group welcomes these developments because they provide the building blocks of an international regulatory framework for private military and security companies.

7. The Working Group examines these issues in more detail below. In section II, it provides an update on its activities, while in section III it reports on the recent activities of mercenaries. In section IV, it describes the activities of private military and security companies. In section V, it covers the regulatory efforts under way at various levels regarding such companies and, in section VI, it presents conclusions and recommendations.

8. A new member from the Western European and other States, Gabor Rona (United States of America), was appointed by the President of the Human Rights Council on 30 September 2011, during the eighteenth session of the Council.

II. Activities of the Working Group during the past year

9. In accordance with its usual practice, the Working Group held three regular sessions during the reporting period: two in Geneva (from 24 to 28 October 2011 and from 12 to 16 March 2012) and one in New York (from 30 July to 3 August 2012). It continued to receive and review reports regarding the activities of mercenaries and private military and security companies and their impact on human rights, in addition to deciding on appropriate action and consulting representatives of States and non-governmental organizations. During its sixteenth session, in New York, the Working Group also convened a day-long meeting with experts in international law and the regulation of private military and security companies to consider the impact of changes in the industry and other initiatives on the text of the draft convention previously proposed by the Working Group. It also convened a half-day meeting of non-governmental organizations involved in the sphere of business and human rights to discuss synergies between efforts to implement related voluntary frameworks. In addition to the industry initiative specific to the private military and security company industry (the International Code of Conduct for Private Security Providers), the following frameworks were discussed: the Guiding Principles on Business and Human Rights adopted by the Human Rights Council (A/HRC/17/31, annex), the Voluntary Principles on Security and Human Rights,[1] the Organization for Economic Cooperation and Development Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,[2] the Maastricht Principles on

[1] Available from www.business-humanrights.org/ConflictPeacePortal/Specialinitiatives/VoluntaryPrinciples.

[2] Available from www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf.

Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights[3] and section 1502, on conflict minerals, of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[4]

A. Country visits

10. The Working Group has requested invitations to visit Côte d'Ivoire, Libya and Somalia. Its planned mission to Libya in May 2012 was postponed owing to difficulties in arranging meetings and security concerns. The Working Group remains committed to visiting Libya, as proposed to the Government, in October 2012. It also awaits the positive responses of the Governments of Côte d'Ivoire and Somalia to its requests.

B. Communications

11. During the period under review, the Working Group sent a communication to the Government of the United States requesting information on specific legislative matters and various court cases involving private contractors. The Working Group expresses thanks to the Government for its detailed reply, which reflects an important aspect of the cooperation of Governments with regard to the Working Group's mandate.

C. Other activities of the Working Group

12. The Chair-Rapporteur of the Working Group, Faiza Patel, participated from 13 to 17 August 2012 as a resource person in the above-mentioned second session of the open-ended intergovernmental working group. Before the session, the Working Group submitted a detailed paper in which it set out its position that there were gaps in international law relating to the activities that could be properly performed by private military and security companies and to the specific content of States' general obligations under human rights and humanitarian law regarding such companies. In the light of those gaps and the transnational nature of the private military and security company industry, the Working Group argued that an international convention was the most effective solution to the challenge of regulating private military and security companies.

13. Over the past year, the Working Group has, on several occasions, engaged in discussions with the Department of Safety and Security regarding the development of United Nations policies on the Organization's use of armed private security companies. The Working Group appreciates the Organization's efforts to develop a human rights-compliant policy framework for the procurement and use of such companies. On 28 August 2012, the Working Group provided its written comments on the draft United Nations security policy manual on armed private security companies, the United Nations Security Operations Manual and the guidelines on the use of armed services from private security companies. It reiterated its view,

[3] Available from www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf.

[4] Available from www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

expressed during its discussions with the Under-Secretary-General for Safety and Security on 1 August 2012, that the framework could be strengthened by further mainstreaming human rights in the Organization's policy and operational documents.

14. The Working Group has undertaken to conduct a survey of national regulatory frameworks relevant to private military and security companies. For the purposes of the study, a private military and/or security company is defined as a corporate entity that provides, on a compensatory basis, military and/or security services by physical persons and/or legal entities. This research will assist in identifying best practices, provide a basis for research by stakeholders and will inform the report of the Working Group to the Human Rights Council at its twenty-fourth session, in 2013. The results of this comprehensive study and analysis will be made publicly available on the section on the Working Group of the website of the Office of the United Nations High Commissioner for Human Rights.

15. The Working Group initiated the survey by requesting information on relevant national legislation from Member States through a letter sent on 9 May 2012, followed by a reminder letter on 26 June. The Working Group is grateful to all those Member States that have submitted information and is looking forward to further responses in the coming months. The Working Group also contacted international and regional organizations that might have access to information on private military and security company legislation to obtain their input.

16. The Working Group is cooperating with the Geneva Centre for the Democratic Control of Armed Forces and the University of Denver in collecting information on national legislation. It will also carry out its own research through specialized websites and direct outreach to relevant Government officials to obtain private military and security company legislation that is not readily available. Initially, the Working Group will focus on the African continent.

17. On 31 January 2012, as part of a public consultation process, the Working Group submitted extensive comments on a Swiss draft law on the provision of private security services abroad. The approach taken in the draft law is analysed in detail in the report of the Working Group to the Human Rights Council at its twenty-first session (A/HRC/21/43) and discussed in section V.C below.

18. In December 2011, the Working Group joined an amicus curiae brief submitted by Human Rights First to the United States Court of Appeals for the Fourth Circuit in the cases of *Al-Shimari v. CACI International, Inc.* and *Al-Quiraishi v. L-3 Services, Inc.*, in which it was argued that contractors accused of international human rights violations, in this case torture, should not be exempted from civil liability in United States courts on the grounds that they were performing combatant activities. On 11 May 2012, the appeals court dismissed the appeal by the contractors and referred the case back to the district courts for further fact-finding.

19. On 30 March 2012, the Working Group submitted comments on the draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers.

20. In addition, individual members of the Working Group carried out the following activities:

(a) The Chair-Rapporteur participated in the annual joint seminar of the United Nations Office at Geneva and the Geneva Centre for the Democratic Control

of Armed Forces convened on 7 December 2011 on the subject of the privatization of security;

(b) From 30 May to 1 June 2012, the Chair-Rapporteur participated in a conference convened at the Sié Chéou-Kang Center for International Security and Diplomacy at the University of Denver, where she discussed current regulatory efforts and continuing challenges relating to the activities of private military and security companies;

(c) Patricia Arias participated in a regional workshop for North-East and Central Asia on the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (A/63/467-S/2008/636, annex), held on 12 and 13 October 2011 in Ulaanbaatar. She gave a presentation on activities of private military and security companies in the scenario of the use of force, their impact on human rights, risks and challenges;

(d) Elżbieta Karska participated in a side event of the thirty-first International Conference of the Red Cross and Red Crescent, held in Geneva from 28 November to 1 December 2011, entitled "Protecting civilians in armed conflict: beyond the Montreux Document — international developments in private military and security company regulation". She gave a presentation on gaps in international human rights and humanitarian law in relation to accountability for violations of international law involving private military and security companies;

(e) On 28 March 2012, Mr. Rona participated as a resource person in the second session of the Committee on Enforced Disappearances, during which the Committee held consultations on the definition of non-State actors and their involvement in enforced disappearances, including issues of responsibility and accountability.

III. Update on mercenary activities

21. The Working Group is concerned about the continuing activities of mercenaries along the border of Côte d'Ivoire and Liberia and about the inability of the relevant authorities effectively to investigate and prosecute reported cases of human rights violations. It is currently preparing a letter to the relevant Governments about those activities. The Working Group also remains concerned about the alleged use of mercenaries in the conflict in Libya and their detention in the aftermath of the conflict.

22. On 30 November 2011, the former President of Côte d'Ivoire, Laurent Gbagbo, was transferred to the detention centre of the International Criminal Court in The Hague, charged with four counts of crimes against humanity for acts committed during the post-election violence in Côte d'Ivoire. The acts forming the basis of the charges were allegedly committed by the former regular armed forces of the Gbagbo regime, reinforced by pro-Gbagbo youth militia and mercenaries.

23. The removal of Mr. Gbagbo notwithstanding, mercenaries continue to pose a serious human rights and security problem in Côte d'Ivoire and their activities should be tackled systematically and comprehensively. Several reported incidents during the past year highlight this need.

24. On 13 April 2011, the Liberian authorities captured the notorious Liberian mercenary, Isaac Chegbo (also known by his noms de guerre "Bob Marley" or "Child Could Die"), who allegedly helped to orchestrate two massacres in which more than 120 men, women and children were killed in and around Bloléquin, Côte d'Ivoire, on 22 and 25 March 2011 (S/2011/757, para. 33). Chegbo reportedly acknowledged that he had been hired as a mercenary to fight the new regular armed forces, as created on 17 March 2011, and to fight as a mercenary in support of pro-Gbagbo forces (S/2012/448, paras. 62-63). That admission notwithstanding, the Liberian authorities failed to prosecute him and the Monrovia Circuit Court C released him on bail on 1 February 2012. The Working Group notes with concern that, the attempts of the Panel of Experts on Liberia to obtain clarification notwithstanding, it remains unclear whether the charges against Chegbo were dropped or whether he was released on bail and the charges are pending.

25. In January 2012, the Liberian police arrested 73 Ivorians and 1 Liberian identified as a mercenary recruiter. They were suspected of planning an attack on Côte d'Ivoire. In its report, the Panel of Experts on Liberia indicates that the County Attorney of Grand Gedeh did not properly investigate the charges and precipitously decided to release all 74 detainees on 20 February 2012 (ibid., paras. 67-77, and S/2012/186, para. 32).

26. A third incident occurred on 24 April 2012, when a group of some 20 men attacked the Ivorian village of Sakré. According to the Panel of Experts on Liberia, the attackers were Ivorians and Liberians aiming to create instability and loot property. Seven civilians were killed and two injured. Several houses were destroyed and more than 3,000 civilians fled to nearby villages. The Ivorian armed forces succeeded in capturing four of the attackers, all Ivorians, who are currently in custody (S/2012/448, paras. 78-83).

27. The Working Group is particularly concerned about reports that armed militias hostile to the Government of Côte d'Ivoire have been recruiting and training Liberian children between the ages of 14 and 17 to carry out cross-border raids.[5]

28. In June 2012, seven United Nations peacekeepers were killed in Côte d'Ivoire. In its press statement on the incident, the Security Council expressed deep concern at the prevailing insecurity in western Côte d'Ivoire and the border area and continued cross-border movements of armed elements, including militias and mercenaries.

29. It appears that, to date, no national-level strategy has been developed in Côte d'Ivoire or Liberia to tackle the issues identified by the Security Council. The largely uncontrolled cross-border movement of armed elements, possibly including mercenaries, poses serious risks to the stability of the region and to the human rights of the populations living in the border areas (S/2012/186, paras. 25 and 27).

30. The Minister for Human Rights and Civil Liberties of Côte d'Ivoire met the Working Group in March 2012 and indicated that his Government was prepared to receive a country visit. On 25 June, the Working Group reiterated its previous request to visit in 2012.

[5] Human Rights Watch, "Liberia: Ivorian Government foes wage, plot attacks — investigate, prosecute war criminals from Côte d'Ivoire conflict in Liberia", 6 June 2012. Available from www.hrw.org/news/2012/06/06/liberia-ivorian-government-foes-wage-plot-attacks.

31. In November 2011, Saif al-Islam Qadhafi, the fugitive son of the former leader of Libya, who had been accused of involvement in mercenary activities by the International Criminal Court, was captured. In February 2012, the Security Council voted unanimously to refer the matter to the Court, on the basis of the arrest warrant issued by the latter. The Government of Libya rejected the surrender request, however, causing the Prosecutor of the Court to request the Court to report Libya to the Council.

32. On 17 March 2012, the Mauritanian authorities arrested the Qadhafi-era intelligence chief, Abdullah al-Senussi, who reportedly orchestrated the recruitment and operations of mercenaries in Libya. Mauritania has taken the position that it will conduct its own investigation before considering extradition requests from Libya, France and the International Criminal Court.

33. Beyond the responsibility for mercenary recruitment borne by high-level officials of the Qadhafi regime, a major issue that remains unresolved in Libya is the status of a number of foreign fighters, who primarily come from other parts of Africa and who fought alongside the Qadhafi forces. In its March 2012 report (A/HRC/19/68), the International Commission of Inquiry on Libya, established on 25 February 2011 by the Human Rights Council to investigate alleged violations of international human rights law in Libya, reiterated its view that, while it was clear that fighters of foreign descent had fought alongside Qadhafi's forces, it was unclear whether those fighters fell within the definition of "mercenary" under the International Convention against the Recruitment, Use, Financing and Training of Mercenaries or under the Convention for the Elimination of Mercenarism in Africa. The main reason for that uncertainty was the lack of information about the terms under and purpose for which they were contracted.

34. Among the categories of fighters that the Commission found would probably not be categorized as mercenaries were: an organized group of Sudanese fighters who were brought in by the Qadhafi Government; a group of Tuareg fighters who were recruited from various regions of Libya; and various Libyan nationals or residents who were originally from Chad, Mali or the Niger.

35. The Commission of Inquiry also noted that the terms "foreigners" and "mercenaries" were used by the interviewees interchangeably to describe persons with dark skin who had taken part either in the conflict or in suppressing demonstrations against the Qadhafi regime.

36. Although it is far from clear that the foreign fighters in Libya were in fact mercenaries, they are being held as such at various facilities around the country. The Working Group is concerned that, as reported by the Commission of Inquiry, the *thuwar* (anti-Qadhafi forces) have been involved in the arbitrary arrest and enforced disappearance of perceived Qadhafi loyalists, security officers, alleged mercenaries and members of the former Government, and that detainees have been arrested without a warrant, without being told the reasons for their arrest, and without a reasonable suspicion that they have been individually involved in criminal activity.

37. The Working Group is furthermore concerned that, according to the Commission, a number of detainees are being held outside any legal framework in unacknowledged centres. Lastly, the Working Group notes the concerns expressed by the Commission regarding the conditions of detention of those fighters, including the maltreatment that is still taking place in centres under the control of local

military councils and security committees and the fact that access to family members remains limited and that access to lawyers is still not afforded.

38. To examine the situation of those held as mercenaries and to provide the Government with its recommendations on how to tackle this situation, the Working Group has expressed to the Government its willingness to visit Libya. As noted above, the visit scheduled to take place from 21 to 25 May 2012 was postponed. The Working Group hopes to carry out its visit, as agreed with the Government, in October 2012.

IV. Private military and security companies

A. Evolving role of private military and security companies in Afghanistan and Iraq

39. As foreign military involvement in the conflicts in Afghanistan and Iraq diminishes, the role and activities of private military and security contractors in those regions have evolved.

40. In Iraq, for example, as at March 2010, the United States Department of Defense employed 95,461 contractor personnel (compared to some 95,900 uniformed personnel in-country). A total of 62,295 personnel (65 per cent of contractors) performed base support functions such as maintaining the grounds, running dining facilities and performing laundry services. Security was the second most common service provided, with 11,610 personnel (12 per cent of contractors). With the withdrawal of United States ground troops at the end of 2011, the overall number of contractors has fallen. The number of contractors providing base support and construction has fallen most dramatically, but the number of private contractors providing security has also dropped, to 2,417.[6]

41. At the same time, however, private military and security companies are expanding their involvement in other spheres. The United States Department of State has indicated that it will have some 5,000 private security personnel to protect its diplomatic personnel and facilities in Iraq. It is also building aviation capability to transport its personnel around the country. Its helicopters and fixed-wing aircraft will reportedly be operated by contractors. In addition, it will have 4,500 "general life support" contractors.[7]

42. Contractors that previously worked with foreign forces are looking to provide their services to foreign multinationals operating in Iraq, in particular in the extractive sector. On 29 February 2012, however, the Oil Ministry of Iraq issued an order in which it banned foreign security companies from the 12 major oil fields

[6] Moshe Schwartz, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis*, Congressional Research Service, 13 May 2011. Available from www.fas.org/sgp/crs/natsec/R40764.pdf.

[7] Kirit Radia, "A look at US presence in Iraq after troops leave", 21 October 2011. Available from http://abcnews.go.com/blogs/politics/2011/10/a-look-at-us-presence-in-iraq-after-troops-leave/.

being developed by international companies, mainly in the south, with security to be provided by the country's oil police.[8]

43. According to the United States Congressional Research Service, in 2011, the number of private security contractors employed by the United States Department of Defense in Afghanistan reached a record high of 18,919.[6] As detailed in section IV.C below, the Government of Afghanistan has been making significant efforts to reduce the use of private military and security companies by the International Security Assistance Force and by governmental and non-governmental agencies that are engaged in providing development assistance. It has also been working to ensure that contractors follow relevant national rules. In January 2012, the Afghan police arrested two British private security contractors and their two Afghan colleagues working for the international security company GardaWorld and ordered their company closed down after finding a cache of illegal AK-47 rifles in their vehicle.[9]

B. Maritime security

44. Over the past several years, armed private security guards have increasingly become a feature of maritime shipping. Piracy has become a significant issue for the shipping industry, in particular off the coast of Somalia in the Gulf of Aden and in the Indian Ocean. The International Maritime Bureau reports that, of 189 piracy and armed robbery attacks on-board ships in 2012, 70 took place off the coast of Somalia, with a total of 212 hostages being taken.[10] The shipping industry has responded to such attacks by engaging armed private security guards on ships. The Foreign Affairs Committee, a parliamentary body in the United Kingdom of Great Britain and Northern Ireland, has noted that, while in the past it was widely judged that the risks of private armed security guards on-board ships would outweigh the benefits, over the past year their use has become increasingly accepted by the maritime industry. It is currently estimated that between 15 and 25 per cent of vessels operating off the coast of Somalia use such services.[11] It has also been reported that insurers frequently require maritime companies to engage armed security.

C. Peace industry

45. Another area in which private military and security companies are increasingly involved is peacekeeping operations, where they are either engaged by States that are unwilling or unable to send their own military personnel to support peacekeeping efforts or by the United Nations. These activities were highlighted in

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[8] UPI, "Iraq bans security firms on oil fields", 19 March 2012. Available from www.upi.com/Business_News/Security-Industry/2012/03/19/Iraq-bans-security-firms-on-oil-fields/UPI-21471332177942/.

[9] Buck Sexton, "Afghan police arrest British security contractors for 'arms transport'", 5 January 2012. Available from www.theblaze.com/stories/afghan-police-arrest-british-security-contractors-for-arms-transport/.

[10] See www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures.

[11] United Kingdom, House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia* (London, The Stationery Office, 2012). Available from www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/1318.pdf.

three recent reports.[12] The Working Group has begun to study this aspect of the private military and security company industry and will provide further views in future reports. The Working Group notes that, as discussed in further detail in section II.C, the United Nations is developing policies with regard to its use of private military and security companies as armed security. Other aspects of the Organization's use of such companies, however, would not be covered by these policies and also require attention.

V. Efforts to regulate private military and security companies

46. As the private military and security company industry is evolving, so too are efforts to ensure that it is properly regulated and that victims of human rights violations by companies have access to remedies. The Working Group notes that companies often take on functions that are traditionally the preserve of State armed forces. It has long been recognized that these types of functions pose particular risks to human rights because they involve the potential for the use of force against civilians and the citizenry. These risks are further exacerbated by the environments in which the companies typically operate: conflict and post-conflict situations and places in which the rule of law is weak.

47. Given these risks, the Working Group has taken the position that private military and security companies should be regulated by States, preferably through an international convention. The Working Group also recognizes the vital role played by national legislation in ensuring that such companies comply with international human rights and humanitarian law standards and that victims of abuses have access to remedies. Industry standard-setting efforts are another key means of generating greater respect for human rights and humanitarian law. As detailed below, the recognition that more needs to be done to regulate private military and security company activities is apparent at all these levels.

A. International regulation

48. In 2008, the Working Group proposed a list of elements that could be included in a convention on private military and security companies (A/63/325) and developed text for such a convention in 2011 (A/HRC/WG.10/1/2). As mentioned above, in its resolution 15/26, the Human Rights Council established an open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework, including, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into

[12] Sabelo Gumedze and others, "From market for force to market for peace: private military and security companies in peacekeeping operations", Monograph No. 183 (Pretoria, Institute for Security Studies, 2011). Available from www.issafrica.org/pgcontent.php?UID=31221; Åse Gilje Østensen, "UN use of private military and security companies: practices and policies", SSR Papers No. 3 (Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2011). Available from www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies; Global Policy Forum, "Dangerous partnership: private military and security companies" (2012). Available from www.humansecuritygateway.com/showRecord.php?RecordId=37946.

consideration the principles, main elements and draft text as proposed by the Working Group. The open-ended intergovernmental working group held two sessions, the second of which took place from 13 to 17 August 2012. At the conclusion of extensive substantive discussions with the participation of experts, including the members of the Working Group, the open-ended intergovernmental working group concluded that it would be useful to continue to explore the issues relating to the industry, including the option of elaborating a convention on private military and security companies. It recommended to the Human Rights Council that discussions should be continued for a further period of two years.

49. There is also increasing recognition of the need to regulate the use of armed security on-board shipping vessels. In a recent interim guidance paper, the International Maritime Organization (IMO) notes that, while the United Nations Convention on the Law of the Sea and customary international law provide the coastal State with sovereignty in its territorial sea, no international guidance or standards currently exist for private maritime security companies providing such services. It also states that such guidance would improve governance, reduce the potential for accidents and promote competent, safe and lawful conduct at sea (MSC.1/Circ.1443, annex, para. 1.1). IMO acknowledges the value of the Montreux Document and the International Code of Conduct for Private Security Service Providers, but notes that they are not directly relevant to the situation of piracy and armed robbery in the maritime domain and do not provide sufficient guidance for private military and security companies (ibid., para. 2.1). The guidance was issued to fill this regulatory gap in the interim and to assist in the development of an international standard and certification process for private military and security companies to protect against acts of piracy and armed robbery at sea and to assist such companies in demonstrating their competence and professionalism to shipowners in the interim (ibid., para. 2.3).

50. In its most recent report (S/2012/544), the Monitoring Group on Somalia and Eritrea similarly notes the absence of control and inspection of armed activities (para. 74) and that, despite the guidelines, recommendations and model contracts issued by IMO and the Baltic and International Maritime Council, the activities of this industry remain unmonitored and largely unregulated (para. 72 and annex 5.4).

51. Security providers themselves have noted the need for better regulation. The Security Association for the Maritime Industry recently pointed out that, while there were more than 60 private maritime companies offering armed protection off the coast of Somalia and across the Indian Ocean, the level of service was inconsistent and sometimes illegal, and that it was clear that there was a requirement for some form of quality control of maritime security companies.[13]

52. The Working Group is of the view that the maritime security industry is just one example of an ever-expanding range of private military and security company activities requiring international regulation. As part of its efforts to further explore the issues relating to maritime security providers, the Working Group has been discussing with the Transitional Federal Government of Somalia the possibility of a country visit in December 2012. It has also initiated contact with IMO to maintain links between the process of developing regulations for maritime security companies and the human rights processes in Geneva.

[13] See www.marsecreview.com/wp-content/uploads/2011/04/SAMI-Brief-3-Apr-11..pdf.

53. In addition to the developments with regard to new international standards for private military and security companies, efforts have been made to ensure that States are aware of their existing obligations. At the initiative of the Government of Switzerland, two regional workshops were held to promote the Montreux Document: in October 2011, in Ulaanbaatar, and in May 2012 in Canberra. They had the objectives of raising awareness of the regional issues associated with private military and security companies, identifying regulatory options for Governments and discussing the relevance of the Montreux Document to the North-East and Central Asian and Pacific regions.

B. Regional efforts

54. In its resolution of 11 May 2011 on the development of the common security and defence policy, the European Parliament considered that it was necessary to adopt European Union regulatory measures, including a comprehensive normative system for the establishment, registration, licensing, monitoring and reporting on violations of applicable law by private military and security companies, both at the internal and external levels. The Parliament called upon the European Commission and the Council of the European Union to initiate appropriate actions. In its February 2012 position paper on the European Union priorities at the Human Rights Council, the Council of the European Union stressed the importance of effective regulation to prevent or remedy human rights violations that had a connection to the activities of private military and security companies. It endorsed the initiative of the High Representative of the European Union for Foreign Affairs and Security Policy to express the Union's support for the Montreux Document as a contribution to stronger international regulation and control of the activities of private military and security companies. That support was reiterated in the European Union Strategic Framework and Action Plan on Human Rights and Democracy, in which the Council of the European Union stated the Union's commitment to promoting adhesion by third countries to the Montreux Document.

C. Developments at the national level

55. National-level efforts have been made to better regulate the activities of private military and security companies. As noted previously, the Working Group has recently launched an initiative to prepare a comprehensive map of national legislation in this sphere. Accordingly, the developments highlighted below provide examples of national legislation, but are by no means a comprehensive survey.

1. Afghanistan

56. Presidential Decree No. 62 of 2010 provides for the gradual elimination of private security companies from the country. Embassies and entities with diplomatic status are exempted and may continue to employ private security companies for guard services. The first phase of the transition period had been expected to end on 20 March 2012, at which time the responsibility for providing security for development sites and convoys would have been assumed by the Afghan Public Protection Force. The process was affected by delays, however, leading the Government to grant companies extensions ranging from a few weeks to 90 days. It appears that the Force is ramping up its capacity to assume its responsibilities: the

North Atlantic Treaty Organization training mission in Afghanistan reported that, as at 4 June 2012, the Force had a staffing complement of approximately 16,000 guards (including 6,000 who made a transition from private security companies) of the target goal of approximately 30,000 guards by March 2013.[14]

2. Germany

57. On 18 July 2012, the Cabinet adopted draft legislation on maritime security providers, requiring certification of security service providers based in Germany conducting operations seawards of the German exclusive economic zone. German-flagged ships are required to employ only security providers authorized under the new certification scheme. The law amends the rules on the carrying of weapons and provides that a federal weapons authority will be responsible for approving weapons carried on board. The legislation is expected to be approved by the Bundestag, the federal parliament of Germany, and the Bundesrat, the federal council, by the end of 2012. As currently drafted, it would enter into force on 1 August 2013, although some aspects will probably enter into force earlier so as to allow a transitional period.

3. Switzerland[15]

58. In October 2011, the Federal Department of Foreign Affairs of the Government of Switzerland issued a draft law on the provision of private security services abroad for public consultation. The Working Group welcomed that open and transparent process and submitted its comments in January 2012. The Swiss draft law follows two tracks. First, it prohibits certain activities, including direct participation in hostilities in an armed conflict,[16] the hiring, training and provision of security personnel for direct participation in hostilities, and the provision of security services associated with serious infringement of human rights. Second, it regulates private companies providing security services. Such services are defined to include a range of activities from protection tasks to guarding prisoners to operational or logistical support for armed or security forces and intelligence activities.

4. South Africa[15]

59. On 30 May 2012, the Cabinet approved the Private Security Industry Regulation Amendment Bill (2012) for submission to Parliament. If adopted, the bill, which would amend the Private Security Industry Regulation Act (No. 51 of 2001), would require the registration of companies providing security services. Only companies majority owned by South Africans would be permitted. Where security companies recruit, train, hire out, send or deploy security services outside South Africa, the bill would require them to provide monthly information on such activities to the Director of the Private Security Industry Regulatory Authority. Lastly, it would prohibit companies from engaging in any activity proscribed by the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country

[14] See http://ntm-a.com/archives/tag/afghan-public-protection force.

[15] The present section is based on the report of the Working Group to the Human Rights Council at its twenty-first session (A/HRC/21/43).

[16] Draft article 4 (d) of the Swiss draft law defines direct participation in hostilities as "direct participation in hostilities developing within the scope of an armed conflict abroad within the meaning of the Geneva Conventions and Additional Protocol I and II".

of Armed Conflict Act (No. 27 of 2006) or the Regulation of Foreign Military Assistance Act (No. 15 of 1989).[17]

5. United Kingdom

60. Interim guidance to United Kingdom-flagged shipping on the use of armed guards to defend against the threat of piracy in exceptional circumstances was issued by the Department of Transport of the United Kingdom in November 2011. The guidance, while not binding, provides that armed guards should be used only in exceptional circumstances and that, before taking a final decision on whether to engage armed guards, the shipping company should assess the risks associated with their use. In doing so, the shipping company needs to assess whether the perceived benefits of engaging armed guards substantially outweigh the risks associated with their use. A non-exhaustive list of factors to take into account in making that evaluation is also provided. It is noted in the guidance that the Government of the United Kingdom does not currently recognize an accreditation process for private security companies operating in the maritime sector and that shipping companies must, therefore, be extra vigilant in selecting an appropriate company to provide armed security on-board their ships. Lastly, an entire section is devoted to the question of defending against pirate attack, including rules on the use of force on-board a vessel, and in the United Kingdom in general, and another section to post-incident actions and the reporting obligation with a particular focus on firearms incidents.[18]

6. United States[15]

61. The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 required the Office of Management and Budget to review existing definitions of the term "inherently governmental functions" and to create a single definition that would ensure that only Government employees or members of the armed forces performed inherently governmental functions and other critical functions necessary for the mission success of a federal agency. It would also address any deficiencies in the existing definitions. In September 2011, the Office issued a policy letter in which inherently governmental functions were defined, building on an earlier statutory definition that inherently governmental functions were those that were so intimately related to the public interest as to require performance by federal Government employees.[19] The Office listed functions necessarily included in that definition,[20] in addition to those that would not normally be included.[21] It provided

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[17] The bill is available from www.jutalaw.co.za/media/filestore/2012/06/Private_Security_Industry_Regulations_AB_2012.pdf. Comments are available from http://iissonline.net/?category_name=south-africa.

[18] See http://assets.dft.gov.uk/publications/use-of-armed-guards-to-defend-against-piracy/use-of-armed-guards-to-defend-against-piracy.pdf.

[19] The letter is available at www.gpo.gov/fdsys/pkg/FR-2011-09-12/html/2011-23165.htm.

[20] Among others, the following functions appear on this list: "to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action" and "to significantly affect the life, liberty, or property of private persons".

[21] Among others, the following functions appear on this list: "any function that is primarily ministerial and internal in nature (such as building security, … warehouse operations …)".

an illustrative list of inherently governmental functions[22] and another illustrative list identifying functions closely associated with the performance of inherently governmental functions.[23] It also included guidance for executive departments and agencies on ensuring that appropriate personnel performed inherently governmental and critical functions.

62. There have also been various initiatives in the United States to prevent the outsourcing of specific functions. Most recently, the House of Representatives has been considering the National Defense Authorization Act for Fiscal Year 2013, which contains a provision prohibiting the Department of Defense from granting contracts for private security guard services at military facilities in Afghanistan.

63. The Congress of the United States has also been active in promoting jurisdiction for contractor crimes committed abroad. In addition to the Military Extraterritorial Jurisdiction Act of 2000 and the John Warner National Defense Authorization Act for Fiscal Year 2007, which extended jurisdiction to contractors involved in contingency operations, it is also considering the Civilian Extraterritorial Jurisdiction Act, which would clarify and expand criminal jurisdiction over federal contractors and employees working outside the United States. The Working Group is of the view that this law would substantially improve the ability of United States courts to exercise jurisdiction over private military and security company employees who violate human rights. Nonetheless, as it noted in its communication to the Government, the Working Group is concerned about the existence of an exemption for the authorized intelligence activities of the Government.

D. Industry-led initiatives

64. On 16 January 2012, the Temporary Steering Committee of the International Code of Conduct for Private Security Service Providers, a multi-stakeholder initiative supported by the Government of Switzerland, issued the Draft Charter of the Oversight Mechanism for the Code for public consultation. As the implementing mechanism of the Code, the Charter's structure and procedures have a critical bearing on the realization of the Code's principles, goals and rules. The Charter's effectiveness is the litmus test for the legitimacy of the Code as a means of improving the adherence of private military and security companies to human rights standards.

65. By a letter dated 30 March 2012, the Working Group expressed its continued support for the process of developing the Code and the Charter as a means of

[22] The illustrative list of inherently governmental functions includes "the command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role", "combat", "security operations performed in direct support of combat as part of a larger integrated armed force", "security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat", and "security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat".

[23] The illustrative list of those functions that are closely associated with the performance of inherently governmental functions includes the "provision of non-law-enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details".

improving the adherence of private military and security companies to international humanitarian and human rights standards. The Working Group recognized the challenges of developing the Charter and submitted extensive comments in an effort to improve the draft text so that it would better fulfil the promise of the Code to protect human rights in the context of private military and security company activities.

66. The Working Group encouraged the Temporary Steering Committee to modify the Charter to mainstream the protection of human rights explicitly, which is the expressed goal of the International Code of Conduct. The Working Group also recommended that the Charter should be brought further into compliance with the Guiding Principles on Business and Human Rights. In the view of the Working Group, the Guiding Principles set out the minimum standards that an industry self-regulatory mechanism should meet.

67. The Working Group suggested specific areas in which the Charter could be strengthened. For example, it should require field audits. In addition, the third-party grievance mechanism established by the Charter should be revised to address the substance of third-party complaints (as envisaged in the Code), rather than focusing only on the procedural compliance of member companies. Lastly, the draft Charter contains provisions that permit companies to refuse to share information with monitoring mechanisms owing to contractual provisions or the potential for parallel legal proceedings. While the Working Group recognized the reasoning behind such provisions, it believed that they provided significant loopholes that could prevent the effective operation of Charter mechanisms and that the inclusion of those types of provisions reflected the inherent limitations of a self-regulatory mechanism, which could never replace accountability through the law.

68. The American National Standards Institute approved and issued in March 2012 its quality standard for private security companies. The standard, which builds on the Montreux Document and the International Code of Conduct, aims to provide requirements and guidance for a management system for private security providers with auditable criteria consistent with human rights, legal obligations and good practices. Those involved in the development of the standard have indicated that the goal is to undertake the process for becoming a standard approved by the International Organization for Standardization.

VI. Conclusions and recommendations

A. Mercenaries

69. **The Working Group is deeply concerned about the alleged involvement of mercenaries in Côte d'Ivoire in killing and injuring civilians, the recruitment of children and in looting private property.**

70. **The Working Group urges Côte d'Ivoire and Liberia to identify, arrest and promptly prosecute the mercenaries responsible for violations of human rights and to take the measures necessary to prevent the recruitment and training of mercenaries, with special emphasis on children, on their territories.**

71. **The Working Group further requests the President of Côte d'Ivoire, in his capacity as Chair of the Authority of Heads of State and Government of the**

Economic Community of West African States, to tackle the threats to human rights posed by mercenary activities in the subregion.

72. **At the same time, the Working Group is concerned about the measures taken by the Government of Libya against alleged mercenaries, their detention conditions and their rights to a fair trial. The Working Group urges the Libyan authorities to charge detainees being held in connection to the conflict for their involvement in specific criminal acts and to release those against whom there is no evidence of crime.**

73. **The Working Group requests Libya to ensure that conditions of detention of persons accused or suspected of being mercenaries comply with applicable international law, including proper treatment of detainees, access to lawyers and family, and the ability to lodge complaints of torture and ill-treatment.**

74. **The Working Group further appeals to Member States that are not yet parties to consider acceding promptly and as a matter of urgency to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.**

B. Private military and security companies

75. **Given the risk to human rights of the activities of private military and security companies, the Working Group welcomes efforts by States to continue discussing the possibility of international regulation, in addition to the progress at the regional and national levels and industry-led initiatives.**

76. **The Working Group is of the view that further research into effective national regulatory strategies is needed and recommends that Member States respond to its request to collect all national legislation relevant to private military and security companies to facilitate analysis by multiple stakeholders.**

77. **The Working Group welcomes efforts to clarify obligations under international law and identify good practices, such as the Montreux Document, and industry self-regulation initiatives, such as the International Code of Conduct for Private Security Service Providers. The Working Group urges States to recognize these initiatives as complementary to, but no substitutes for, strong international and national regulatory frameworks.**

78. **The Working Group reiterates its view that a comprehensive, legally binding international regulatory instrument is the best way to ensure adequate protection of human rights. The Working Group therefore encourages all States to participate actively in the work of the intergovernmental working group established by the Human Rights Council with a view to considering the possibility of an international instrument for the regulation of private military and security companies.**

79. **The Working Group encourages States to ensure the investigation and prosecution of violations of international human rights law involving private military and security companies to guarantee accountability for human rights violations and provide an effective remedy for victims.**